

***United States Court of Appeals
for the Second Circuit***



**APPELLANT BRIEF
ON REHEARING
EN BANC**

ORIGINAL

77-1243
77-1258

In The
United States Court of Appeals
For The Second Circuit

UNITED STATES OF AMERICA,

Appellee,

-against-

WILLIAM HOCKRIDGE,

Defendant. Appellant

PETITION FOR REHEARING AND
PETITION FOR REHEARING EN BANC

IRVING ANOLIK

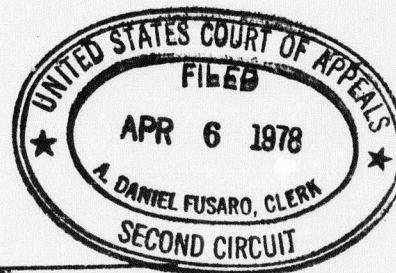
Attorney for Defendant-Appellant

William Hockridge

225 Broadway

New York, New York 10007

(212) 732-3050



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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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Docket No. 77-1258
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UNITED STATES OF AMERICA,

v.

Appellee,

WILLIAM HOCKRIDGE,

Defendant-Appellant.
-----x

PETITION FOR REHEARING
AND PETITION FOR REHEAR-
ING EN BANC

TO THE HONORABLE CIRCUIT JUDGES OAKES and VAN GRAAFEILAND
and DISTRICT JUDGE BARTELS:

The petitioner, WILLIAM H. HOCKRIDGE, respectfully prays that this Panel of the Court will grant him a rehearing and give reconsideration to its decision and opinion of March 27, 1978, wherein it affirmed the judgment of the United States District Court for the Southern District of New York, convicting HOCKRIDGE and two others (Charles Petri and Stephen K. Easton) of violating 18 U.S.C. §371 and for 18 U.S.C. §656.

(A)

THE FACTUAL BACKGROUND

This Court's opinion has set forth the facts, and the briefs heretofore filed have given them in greater detail.

The charges stemmed from an alleged conspiracy to misapply moneys of the Chemical Bank, HOCKRIDGE's employer; to prepare and submit false financial statements for the purpose of obtaining loans from Chemical Bank and The Bank of New York; and to make false entries in Chemical Bank's books and records. The substantive count (Count Two) charged misapplication and assisting in the misapplication of over one million dollars in Chemical Bank's assets.

(B)

REASONS FOR GRANTING A REHEARING

1. First, we incorporate by reference all the arguments heretofore made in our main brief.

2. As this Court perceived, in its opinion, one of the main arguments centered around alleged jury bias and misconduct. It is not contested that Jurors Numbers 3 and 4 reported prior to the conclusion of deliberations, but after taking a partial verdict on Count One, that their verdict on that Count did not reflect their true beliefs and that a "grave injustice" was perpetrated. The Jurors were not immediately interviewed by the Trial Judge, but the following morning, which was still before the jury had completed its deliberations on the other counts, Judge Bonsal, the Trial Judge, interrogated them.

There is no question but that both Jurors voiced doubts about the propriety of their verdict. The Court indicated, after some colloquy, that they should

resume deliberations and that he would get back to them at some later time. He, of course, never did.

3. The Court below ultimately let the verdict stand.

We have detailed, in our main brief, as have the co-appellants, various reasons why the Court below should have granted a mistrial, at the very least.

4. We believe that this case, with respect to the point we have been discussing, namely whether Rule 606(b) bars the impeachment of a partial verdict by the voluntary and spontaneous testimony of a juror prior to the jury's discharge, is one of first impression.

At page 2143 of the Slip Opinion herein, this Panel, in effect, concedes the novelty of the foregoing issue and the fact that "[n]either the cases nor the treatises definitively answer the question whether Rule 606(b) bars the impeachment of a partial verdict by the voluntary and spontaneous testimony of a juror prior to the jury's discharge."

Since this is the case, we believe that this is an appropriate issue to be heard en banc at a rehearing. The issues involved herein are important to the proper preservation of a fair trial by an impartial jury. It is elementary that the verdict of a jury must be unanimous (MAXWELL v. DOW, 176 U.S. 581 [1900]; AMERICAN PUB. CO. v.

FISHER, 166 U.S. 464 [1897]; SPRINGVILLE v. THOMAS, 166 U.S. 707 [1897]; Cf. ANDRES v. UNITED STATES, 333 U.S. 740 [1948]).

In the case at bar, jurors who had indicated that they were dissatisfied with the verdict they had rendered, were nevertheless directed to resume deliberations. In effect, this was similar, so far as these two talismen were concerned, to giving them an "Allen charge". This created a situation where the Judge unavoidably added his influence to their belief that they must side with the majority (UNITED STATES v. SAWYERS, 423 F.2d 1335, 1349 (4 Cir., 1970), and UNITED STATES v. ROBINSON, 544 F.2d 611, n. 14 (2 Cir., 1976)).

5. This Panel has determined that the judgment below should be affirmed, without resolving the problem. It has judicially legislated that "...in the future the appropriate action of the trial judge faced with a similar request by a juror to reconsider a prior recorded partial verdict should be to advise the juror simply that such a verdict is final..." (Slip, p. 2147).

We submit that a policy for future action such as that set forth under "5" above, is one that should be made en banc and, further, that it is an unfair procedure.

In essence, such a declaration of policy is like asking trial judges to "stick their heads in the sand" like an ostrich and to ignore any complaint by a juror concerning a partial verdict. We presume that a trial judge would be forbidden to even conduct a voir dire. (See GRACE LINES, INC. v. MOTLEY, 439 F.2d 1028, 1032 (2 Cir., 1971); UNITED STATES v. PLEVA, 66 F.2d 529, 531-33 (2 Cir., 1933)).

6. We ask rhetorically, what should a trial judge do if a stranger had somehow made contact with one or more jurors and told them that he had kidnapped the juror's spouse and would hold that spouse until a proper verdict was rendered? Again, what if a juror, anxious to reach a verdict because of important business, threatens the life of a fellow juror unless he votes a particular verdict?

We could, of course, multiply any number of hypothetical situations by simply giving vent and full reign to our imaginations. In any event, we maintain that full en banc consideration is necessary at a rehearing.

7. In view of the foregoing, we maintain that the only fair thing would have been to have declared a mistrial and that no verdict should stand unless it is unequivocal that it is the "conscientious conviction" of the juror. (GRACE LINES, INC. v. MOTLEY, supra).

CONCLUSION

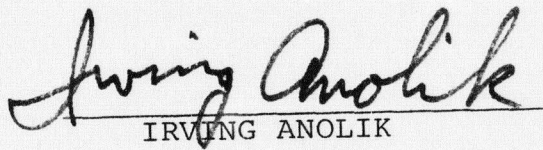
The petition for rehearing should be granted and the judgment of conviction vacated with directions to grant a new trial. In the alternative, this matter should be referred to all the active Judges of this Circuit for determination of the new policy promulgated with respect to impeachment of partial verdicts, for consideration en banc.

Respectfully submitted,

IRVING ANOLIK,
Attorney for Defendant-
Appellant HOCKRIDGE.

CERTIFICATION OF GOOD FAITH:

I, IRVING ANOLIK, an attorney at law duly admitted to practice in this Court, certify that the foregoing petition for rehearing is submitted in good faith and not for the purpose of delay.


IRVING ANOLIK

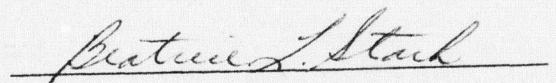
DATED: New York, New York
April 6, 1978.

AFFIDAVIT OF SERVICE BY MAIL

STATE OF NEW YORK
COUNTY OF NEW YORK, ss.:

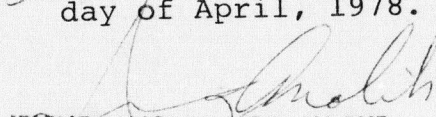
I, BEATRICE L. STARK, being duly sworn, depose and say deponent is not a party to this action, is over 18 years of age and resides at Queens, New York.

That on the 6th day of April, 1978, deponent served the annexed Petition for Rehearing upon the United States Attorney for the Southern District of New York, attorney for appellee in this action, at One St. Andrew's Plaza, New York, New York 10007, the address designated by said attorney for that purpose, by depositing a true copy of same, enclosed in a postpaid properly addressed wrapper, in a Post Office Official Depository under the exclusive care and custody of the United States Post Office Department within the City and State of New York.


BEATRICE L. STARK

Sworn to before me this

6th day of April, 1978.


IRVING ANOLIK, NOTARY PUB.,
New York 0070900 Rockland
Com. Expires March 30, 1979

